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Amsiah Rahim v Borneo Samudera Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02(IM)-377–02 OF 2021
ABDUL KARIM, RAVINTHRAN AND ABU BAKAR JAIS JJCA
6 MAY 2024

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Civil Procedure — Damages — Assessment of damages — Appeal against decision of High Court — Loss of use of land — Whether plaintiff suffered loss arising from deprivation of use of land — Whether appellant claimed for compensatory damages in the statement of claim but subsequently claimed for restitutionary damages in final submissions — Whether respondent would be prejudiced if claim based on compensatory approach was awarded — Whether appellant should be entitled to compensation due respondent occupying land for many years — Whether High Court Judge erred in applying doctrine of election to completely dismiss claim appellant's claim for damages

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This was an appeal against the decision of the judicial commissioner ('JC') who declined to make any award after conducting a trial to assess damages at the High Court. The subject matter of the dispute revolved around the possession of a parcel of land when the appellant became the registered owner of the land in 1998 after having purchased it. At the material time, the respondent was in possession of the land. In the circumstances, vide a letter dated 23 February 2012, the appellant demanded vacant possession of the said land within 14 days from the respondent. Upon the respondent's refusal to deliver possession, the appellant instituted an action for trespass in June of 2012. The High Court found the respondent was liable for trespass but only granted nominal damages of RM1,000 in favour of the appellant. On appeal against the High Court's refusal to hold a trial to assess damages, the Court of Appeal allowed the appeal and remitted the case back to the High Court to assess damages. At the High Court, in the appellant's amended statement of claim, the appellant claimed for compensatory damages for trespass of land, ie for being kept out of the use of her land and to being deprived of the use of her land for 17 years. The appellant's husband ('PW2') gave evidence that at the time of purchase, the land was planted with oil palm and that the appellant intended to continue with oil palm cultivation. If they had not been deprived of possession of the land by the respondent, they could have earned income from selling oil palm fruits after three or four years of planting. The appellant also brought an expert at trial ('PW1') to show much she had lost by not being able to cultivate oil palm during the period of trespass by the respondent. However, at the end of the trial, in the written submission, the appellant claimed for the profits made by the respondent while being in possession of the land instead of the

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estimated loss suffered by the appellant for being deprived of the land. The High Court did not grant any damages whatsoever because the appellant had claimed for compensatory damages in the statement of claim but later claimed for restitutionary damages in the final submissions. In other words, the appellant claimed not what she lost by being deprived of the land but for what the respondent gained during that time. The issues that arose for determination were: (a) whether the High Court was correct in not awarding any damages despite conducting a trial to assess damages on the ground that the appellant fell afoul of the doctrine of election; and (b) whether despite the departure from the election made in the statement of claim, the appellant was entitled to damages proved at trial.

Held, allowing the appeal:

(1) The trite principle was that trespass was actionable per se which meant that once the tort was proved, the claimant was entitled to at least nominal damages. In the instant case, the High Court judge who tried liability awarded only nominal damages of RM1,000. In his evidence, the husband of the appellant gave evidence that at the time of purchase, the land was planted with oil palm and that the appellant intended to continue with oil palm cultivation. In the premises, the appellant was certainly entitled to more than nominal damages in the ordinary course unless she failed to prove damages (see para 21).

(2) The doctrine of election was meant to prevent surprise, unfairness and double claims that could prejudice the defendant due to inconsistent actions and remedies. There was no prejudice that would have been suffered by the respondent if the claim for the lesser sum, based on the compensatory approach, was awarded. The appellant pleaded compensatory damages in the amended statement of claim and evidence was led in respect of the same without objection on a point of pleading. It was only in the final submissions, that the appellant submitted that a higher award should be made based on the profits made by the respondent. Therefore, the High Court judge could have addressed this issue from the standpoint of the rules of pleading and could have directed that any award would have to be in accordance with the pleaded case instead of dismissing it entirely (see para 39).

(3) The High Court judge was not quite right in holding that the claim for compensatory damages was abandoned. This was because the appellant had also said in his final oral reply that in the event the court was not with him in awarding damages based on the gains of the respondent, damages could be awarded based on the evidence of PW1, ie for loss of use of the land for oil palm cultivation. Also, having regard to the plea

for compensatory damages, the High Court judge erred in taking the view that a claim for damages should not include an element of profit (see paras 40–41).

(4) The High Court judge erred in applying the doctrine of election to completely dismiss the claim of the appellant for damages. The appellant should be entitled to the damages that she pleaded, ie compensatory damages for being kept out of her land for 17 years. Having regard to the evidence of PW1 which was not discredited, the claim for general damages in the sum of RM266,990 was allowed. The court also: (a) ordered interest of 5%pa from the date of notice to quit until the date of realisation; and (b) dismissed the claim for exemplary damages as the Court of Appeal order granting a trial for the assessment of damages made no mention of it (see paras 42 & 44).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan pesuruhjaya kehakiman ('PK') yang tidak membenarkan tuntutan selepas perbicaraan untuk menilai ganti rugi di Mahkamah Tinggi. Perkara pertikaian adalah mengenai pemilikan sebidang tanah apabila perayu menjadi pemilik berdaftar tanah itu pada tahun 1998 selepas pembelian. Pada setiap masa material, responden memiliki tanah itu. Melalui surat bertarikh 23 Februari 2012, perayu menuntut pemilikan kosong tanah tersebut dalam tempoh 14 hari daripada responden. Atas keengganan responden untuk menyerahkan pemilikan hartanah tersebut, perayu memulakan tindakan untuk pencerobohan yang dilakukan pada bulan Jun 2012. Mahkamah Tinggi mendapati responden bertanggungjawab atas pencerobohan tetapi hanya memberikan ganti rugi nominal sebanyak RM1,000 kepada perayu. Mengenai rayuan terhadap keputusan Mahkamah Tinggi untuk tidak membenarkan tuntutan ganti rugi, Mahkamah Rayuan membenarkan rayuan itu dan menyerahkan semula kes itu kepada Mahkamah Tinggi untuk menilai ganti rugi. Di Mahkamah Tinggi, dalam pernyataan tuntutan perayu yang dipinda, perayu menuntut ganti rugi pampasan untuk pencerobohan tanah, kegagalan menggunakan tanahnya dan dilucutkan penggunaan tanahnya selama 17 tahun. Suami perayu ('SP2') memberi keterangan bahawa ketika waktu pembelian, tanah itu ditanam dengan kelapa sawit dan perayu berhasrat untuk meneruskan penanaman kelapa sawit. Jika mereka tidak dinafikan hak pemilikan tanah oleh responden, mereka boleh memperoleh pendapatan daripada menjual buah kelapa sawit selepas tiga atau empat tahun penanaman kelapa sawit tersebut. Perayu juga membawa seorang pakar di perbicaraan ('SP1') untuk menunjukkan jumlah kerugian kerana tidak dapat menanam kelapa sawit semasa tempoh pencerobohan oleh responden. Walau bagaimanapun, dalam hujahan bertulis pada akhir perbicaraan, perayu menuntut keuntungan yang diperoleh oleh responden semasa memiliki tanah dan bukannya anggaran kerugian yang dialami oleh perayu ketika dinafikan hak penggunaan tanah tersebut. Mahkamah Tinggi

tidak membenarkan sebarang ganti rugi kerana perayu telah menuntut ganti rugi pampasan di dalam pernyataan tuntutan tetapi kemudiannya menuntut ganti rugi pengembalian dalam hujahan akhir. Dalam erti kata lain, perayu bukannya menuntut gantirugi kehilangan tanah tetapi menuntut keuntungan yang diperolehi oleh responden dalam tempoh pendudukan tersebut. Isu-isu yang timbul untuk penentuan ialah: (a) sama ada Mahkamah Tinggi betul kerana tidak membenarkan sebarang ganti rugi walaupun telah menjalankan perbicaraan untuk menilai ganti rugi atas alasan bahawa perayu bertentangan dengan doktrin pilihan; dan (b) sama ada walaupun bertentangan dengan pilihan yang dibuat di dalam pernyataan tuntutan, perayu berhak mendapat ganti rugi yang dibuktikan di dalam perbicaraan.

Diputuskan, membenarkan rayuan:

(1) Prinsip umum adalah pencerobohan boleh diambil tindakan yang bermaksud bahawa sebaik sahaja perkara tort itu dibuktikan, pihak yang menuntut berhak mendapat sekurang-kurangnya ganti rugi nominal. Dalam kes ini, hakim Mahkamah Tinggi yang membicarakan liabiliti hanya memberikan ganti rugi nominal sebanyak RM1,000. Suami perayu memberi keterangan bahawa pada masa pembelian, tanah itu ditanam dengan kelapa sawit dan perayu berhasrat untuk meneruskan penanaman kelapa sawit. Oleh itu, perayu berhak mendapat lebih daripada ganti rugi nominal dalam keadaan biasa melainkan dia gagal membuktikan ganti rugi tersebut (lihat perenggan 21).

(2) Doktrin pilihan bertujuan untuk mengelakkan kejutan, ketidakadilan dan tuntutan berganda yang boleh menjejaskan defendan kerana tindakan dan remedi yang tidak konsisten. Tiada prasangka yang akan dialami oleh responden sekiranya tuntutan untuk jumlah yang lebih rendah berdasarkan pendekatan pampasan diberikan. Perayu memplidkan ganti rugi pampasan dalam pernyataan tuntutan yang dipinda dan keterangan telah dikemukakan tanpa bantahan. Hanya dalam hujahan akhir, perayu menghujahkan bahawa jumlah yang lebih tinggi harus dibenarkan berdasarkan keuntungan yang diperoleh oleh responden. Oleh itu, hakim Mahkamah Tinggi boleh menangani isu ini dari sudut perkara yang dinyatakan di dalam pliding dan boleh mengarahkan bahawa sebarang gantirugi menurut perkara yang diplidkan dan bukannya menolak tuntutan secara sepenuhnya (lihat perenggan 39).

(3) Hakim Mahkamah Tinggi terkhilaf ketika memutuskan bahawa tuntutan ganti rugi pampasan telah diabaikan. Hal ini kerana perayu juga telah mengatakan dalam jawapan lisan terakhirnya bahawa sekiranya mahkamah tidak bersetuju dengan tuntutan ganti rugi berdasarkan keuntungan responden, ganti rugi boleh diberikan berdasarkan keterangan SP1, iaitu kehilangan penggunaan tanah untuk

penanaman kelapa sawit. Juga dengan mengambil kira rayuan untuk ganti rugi pampasan, hakim Mahkamah Tinggi terkhilaf ketika memutuskan bahawa tuntutan ganti rugi tidak boleh melibatkan unsur keuntungan (lihat perenggan 40–41).

(4) Hakim Mahkamah Tinggi terkhilaf ketika menggunakan doktrin pilihan untuk menolak sepenuhnya tuntutan perayu untuk ganti rugi. Perayu sepatutnya berhak mendapat ganti rugi yang diplidkan, iaitu ganti rugi pampasan kerana dinafikan hak penggunaan tanahnya selama 17 tahun. Dengan mengambil kira keterangan SP1 yang tidak ditolak, tuntutan ganti rugi am berjumlah RM266,990 dibenarkan. Mahkamah juga: (a) memerintahkan faedah sebanyak 5% setahun dari tarikh notis keluar dari tanah tersebut sehingga tarikh penyerahannya; dan (b) menolak tuntutan ganti rugi teladan kerana perintah Mahkamah Rayuan yang mengarahkan perbicaraan untuk penilaian ganti rugi tidak menyentuh mengenai tuntutan ganti rugi tersebut (lihat perenggan 42 & 44).]

Cases referred to

Amm a/l Joy (suing as Chairman Committee Members of Wat Boonyaram v Chuan Seng Sdn Bhd) [2018] 5 MLJ 255, FC (refd)
Annie Quah Lay Nah v Syed Jafer Properties Sdn Bhd & Ors [2007] 1 MLJ 225; [2007] 1 CLJ 1, CA (refd)
Benjamin Scarf v Alfred George Jardine (1882) 7 App Cas 345, HL (refd)
Devenish Nutrition Ltd and others v Sanofi- Aventis SA (France) and others [2008] 2 All ER 249, CA (refd)
Ee Kim Kin v The Collector of Land Revenue, Alor Gajah [1967] 2 MLJ 89 (refd)
Goh Hooi Yin v Lim Teong Ghee & Ors [1990] 3 MLJ 23, HC (refd)
Johandra Realty Sdn Bhd dan satu lagi lwn Ketua Pengarah Jabatan Pengairan dan Saliran Malaysia dan satu lagi [2021] 2 MLJ 738, CA (refd)
Low Kian Hoew v Lu Zhijun & Ors [2020] MLJU 2187, HC (refd)
Ministry of Defence v Ashman [1993] 66 P & CR 195, CA (refd)
Penarth Dock Engineering Co Ltd v Pounds [1963] 1 Lloyd's Rep 359, QBD (refd)
Stoke-on-Trent City Council v W & J Wass Ltd [1988] 3 All ER 394, CA (refd)
Verschures Creameries Ltd v Hull and Neatherlands Steamship Co Ltd [1921] 2 KB 608, CA (refd)
Villa Putra Management Corporation v Mayland View Sdn Bhd [2015] 9 MLJ 779; [2014] 1 LNS 1096, HC (refd)

Appeal from: *Amsiah Rahim v Borneo Samudera Sdn Bhd* [2021] 9 MLJ 693 (High Court, Sandakan)

Caroline Hee Jin Chiu (Tan Pang Tsen & Co) for the appellant.
Ho Kin Kong (with Jeremy Ho Soon Teck) (Ho Chong Yong) for the respondent.

Ravinthran JCA:

[1] This is an appeal against the decision of the learned judicial commissioner who declined to make any award after conducting a trial to assess damages. The appellant had claimed damages for being deprived of the use of her land between 1997 and 2014. The High Court did not grant any damages whatsoever because the appellant claimed compensatory damages in the statement of claim but later claimed for restitutionary damages in the final submissions. In other words, the appellant claimed not what she lost by being deprived of the land but for what the respondent gained during that time. The appellant was the plaintiff in the High Court whereas the respondent was the defendant.

BACKGROUND FACTS

[2] The background facts stated in the judgment of the High Court, which includes the facts agreed upon by the parties are as follows.

[3] The subject matter of the dispute revolves around the possession of a parcel of land held under Native Title No 113039115. The appellant became the registered owner of the land on 11 June 1998 after having purchased it. The respondent company was in possession of the land at the material time. By letter dated 23 February 2012, the appellant's solicitors demanded vacant possession within 14 days.

[4] Upon the respondent's refusal to deliver possession of the land, the appellant instituted the instant action for trespass in June of 2012. Liability was tried first by the High Court. On 17 November 2015, the High Court found the respondent liable for trespass. However, the High Court only granted nominal damages of RM1,000 in favour of the appellant.

[5] The appellant appealed against the High Court's refusal to hold a trial to assess damages. On 19 January 2017, the Court of Appeal allowed the appeal and remitted the case back to the High Court to assess damages.

[6] At the outset of the assessment trial, the parties agreed to the following two issues to be tried:

(1) Whether the plaintiff is entitled to compensation due to the defendant occupying the land before 1998 and had continued to do so until 12.12.2014; and

(2) If so, what is the amount of damages the plaintiff is entitled to?

[7] At the trial, the appellant raised a further issue which was not agreed to

by the respondent. It is as follows:

> Whether the plaintiff is entitled to claim general damages and/punitive and exemplary damages as prayed for at Enclosure 7, prayer (iv) of the Amended statement of claim dated 28.8.2012.

PLEADED CLAIM OF THE APPELLANT

[8] In para 12 of the amended statement of claim, the appellant claimed for compensatory damages for trespass of land, ie for being kept out of the use of her land for a long time. Paragraph 12 reads as follows:

> 12. The plaintiff had no choice but to start the writ in order to gain back the possession of the said land from the Defendant and also to claim damages from the Defendant for trespass over the years. The Plaintiff had suffered damages and loss from the trespass of the said land *because she had been deprived of the use of her rightful land over the years.* (Emphasis added.)

[9] In the opening statement at the assessment trial, counsel for the appellant had said as follows:

> The Plaintiff will rely on the testimony of the expert to show the damages she had suffered due to being deprived of the use of her own land. The Plaintiff's evidence will show that she would have been able to make a profit if she had been able to enter into her own land to develop it into an oil palm estate.

EVIDENCE OF LOSS

[10] The appellant's husband, PW2, testified that his wife intended to use the land to cultivate oil palm. Part of the land had already been planted with oil palm when they purchased it. If they had not been deprived of possession of the land by the respondent, they could have earned income from selling oil palm fruits after three or four years of planting. The appellant's expert witness told the court that he was tasked with preparing a report on the following matters:

1. The costs of production of oil palm on the plaintiff's land;
2. The expected yield of oil palm for the size of the plaintiff's land;
3. The expected profits that the Plaintiff could have made if she had cultivated the land by herself.

SUBMISSION AT END OF ASSESSMENT TRIAL IN THE HIGH COURT

[11] At the end of the trial, in the written submission, counsel for the appellant claimed for the profits made by the respondent while being in possession of the land instead of the estimated loss suffered by the appellant for being deprived of the land. The relevant paragraphs of the submission

pertaining to the claim for damages are as follows:

(i) Compensatory damages of RM563,678.55 to be awarded to the Plaintiff *being the profits made by the Defendant from the Land*;

(ii) Exemplary damages of RM140,919 amounting to 25% of the compensatory damages to be awarded to the Plaintiff (RM563,678.55 x 25% = RM140,919.64). (Emphasis added.)

DECISION OF HIGH COURT

[12] Although, the learned High Court judge conducted a trial pursuant to the order of the Court of Appeal to assess damages for a landowner who had been kept out of her land for 17 years, Her Ladyship did not award any damages whatsoever. However, there was no finding by the learned High Court judge that damages were not proven. The ground for the decision was based on the doctrine of election.

[13] In the pleadings, the appellant claimed damages for the loss of use of the land. Evidence was given that the land in question was suitable for oil palm cultivation and had been planted with oil palm at the time of the purchase. However, during the course of the trial, evidence was elicited from the witness ('DW2') for the respondent that the company had made a profit of RM407,282.19 during the material period. Instead of claiming the loss assessed by her expert ('PW1'), counsel for the appellant submitted at the end of the trial that the gain of the respondent during the material period which is the sum of RM407,282.19 should be the measure of damages to which the appellant is entitled to.

[14] The learned High Court judge said that the appellant had only pleaded compensatory damages in the statement of claim and the opening statement but at the conclusion of the trial had 'shifted gears' and claimed for restitutionary damages. It is for that reason, Her Ladyship declined to make any award of damages. This is apparent from the following passages of her judgment:

> [34] Here, it is not the plaintiff's case that she did not suffer any loss so that she should be compensated by the grant of a restitutionary award based on the defendant's personal gain. In fact, as shown earlier in [12]–[16] the whole tenor of the plaintiff's case was that she had suffered loss and damages arising from being deprived from the use of the land. That was the reason why PW1, the plaintiff's expert was called to give evidence (see [15] above). However, is of significance that despite having allegedly paid PW1 the sum of RM10,000 as his professional fees (Q&A 10 & 11, notes of proceedings), the plaintiff did not rely on this conclusion at all when submitting on the damages payable by the defendant ...
>
> [37] Based on all of the above, I would conclude that *having elected to claim for damages on the basis of loss of use, the plaintiff cannot now shift gears and claim for*

damages on the basis of the defendant's gains. In any event, the plaintiff's pleaded case and evidence do not support such a claim. (Emphasis added.)

[15] The learned High Court judge also said that the claim of the respondent for profits should fail because the award of damages should not include an element of profit.

ARGUMENT OF PARTIES IN THE APPEAL

[16] Counsel for the appellant's main argument is that the High Court erred in declining to make any award of damages despite the order of the Court of Appeal to assess damages.

[17] In respect of the doctrine of election, counsel for the appellant argued that the appellant had pleaded general damages for trespass and had tendered evidence of loss as a result of being deprived of the land for a long period. Therefore, notwithstanding the submission of counsel for a higher award based on the admitted profits of the respondent during the material period, at the very least, the evidence of PW1 should have been considered to grant a lower award for loss of use of the land. Moreover, in the oral reply submission at the conclusion of the trial before the High Court, counsel for the appellant prayed for a lower award of damages based on the evidence of PW1 if the court is not minded to award damages based on the profits of the respondent during the period of the trespass.

[18] Counsel for the appellant also took issue with the pronouncement of the High Court based on the case of *Johandra Realty Sdn Bhd dan satu lagi lwn Ketua Pengarah Jabatan Pengairan dan Saliran Malaysia dan satu lagi* [2021] 2 MLJ 738 that the damages should not include the element of profit.

[19] For the respondent company, their counsel advanced the same argument that found favour with the learned High Court judge, ie the appellant had taken inconsistent positions in the statement of claim and in the written submission at the end of the trial. The appellant had mounted the claim based on compensatory damages and at the conclusion of the trial had made a claim for restitutionary damages. These claims are mutually exclusive and therefore the claim for damages should fail wholly since the appellant abandoned the claim for compensatory damages and did not plead resitutionary damages. Furthermore, the appellant failed to prove resitutionary damages as well.

ISSUES

[20] In the instant case, the overarching issue would be whether the High Court is correct in not awarding any damages despite conducting a trial to assess damages on the ground that the appellant fell afoul of the doctrine of election. The other issues concern the correct approach to assessing damages for trespass and whether, despite the departure from the election made in the statement of claim, the appellant is entitled to damages that she had proven at trial. First, we shall address the general approach to damages in trespass.

DAMAGES FOR TRESPASS

[21] We find that the leading authorities on damages for trespass were considered by the learned High Court judge in her judgment. We shall re-state the applicable principles laid down in the said cases. The trite principle is that trespass is actionable per se which means that once the tort is proved, the claimant is entitled to at least nominal damages. In the instant case, the High Court judge who tried liability awarded only nominal damages of RM1,000. On appeal, a trial to assess damages was ordered. In his evidence, the husband of the appellant gave evidence that at the time of purchase, the land was planted with oil palm and that the appellant intended to continue with oil palm cultivation. In the premises, the appellant is certainly entitled to more than nominal damages in the ordinary course unless she failed to prove damages.

[22] In the English Court of Appeal case of *Stoke-on-Trent City Council v W & J Wass Ltd* [1988] 3 All ER 394 (cited by the Federal Court in *Amm a/l Joy (suing as Chairman Committee Members of Wat Boonyaram v Chuan Seng Sdn Bhd)* [2018] 5 MLJ 255), Nicholls LJ said the following in respect of calculating damages which is more than nominal damages:

> It is an established principle concerning the assessment of damages that a person who has wrongfully used another's property without causing the latter any pecuniary loss may still be liable to that other for more than nominal damages. In general, he is liable to pay, as damages, a reasonable sum for the wrongful use he has made of the other's property.

[23] This is the user principle, ie the trespasser must pay a reasonable sum for using the property of another. This is the normal measure of damages in the law of tort (per Hoffmann LJ in *Ministry of Defence v Ashman* [1993] 66 P & CR 195 at p 200). In the instant case, as the learned High Court judge noted, the appellant had pleaded damages for being deprived of the loss of use of her land. She brought an expert at trial to say how much she had lost by not being able to cultivate oil palm during the period of trespass by the respondent.

[24] The learned High Court judge also quoted the judgment of the English

Court of Appeal in *Devenish Nutrition Ltd and others v Sanofi- Aventis SA (France) and others* [2008] 2 All ER 249 and *Stoke-on-Trent City Council v W & J Wass Ltd* and said that in cases where it is difficult for the trespass victim to identify the financial loss, the wrongdoer can be required to disgorge his gains. This is the restitutionary approach. This approach was somewhat the same approach taken in earlier cases where loss of use by the plaintiff cannot be calculated. For example, in *Penarth Dock Engineering Co Ltd v Pounds* [1963] 1 Lloyd's Rep 359, the plaintiff had no use for the trespassed property. The court ordered damages to be calculated by reference to the value of the property to the trespassers and for the period they had trespassed. The learned High Court judge then observed that in the instant case, the appellant is able to calculate her loss in accordance with her claim for compensatory damages.

[25] We see no error on the part of the learned High Court judge in the way she discussed the principles pertaining to the assessment of damages in trespass. We shall now consider whether the learned High Court judge erred in declining to make any award of compensation because of the alleged transgression of the doctrine of election on the part of the appellant or her counsel.

DOCTRINE OF ELECTION

[26] The doctrine of election, which is to some extent related to the estoppel principle and the principle that one cannot approbate and reprobate, has commonly been invoked to prevent parties from adopting inconsistent positions in prosecuting causes of action and claiming remedies. We will first discuss some of the usual cases in which the doctrine has been used before considering its application to a case involving the assessment of damages.

[27] In the old House of Lords case of *Benjamin Scarf v Alfred George Jardine* (1882) 7 App Cas 345, a partnership firm was dissolved after the retirement of a partner. The remaining partner continued the business with a new partner under the same name. A customer of the old partnership firm sold and delivered goods to the new partnership firm without being aware of the dissolution of the old partnership firm. He sued the new partnership firm but the action was stopped because the said firm went into liquidation. Thereafter, he sued the retired partner. The House of Lords ruled that the retired partner was not liable. In relation to the doctrine of election, Lord Blackburn said as follows:

> And then comes the question which ought to have been decided, not whether there was a novation (upon which probably if I had thought that that was the question I should have agreed with the majority of the Court of Appeal) but whether the plaintiff had before the 30th of September, the date at which he for the first time

made a claim against Scarf, made a final determination of the election by which he had to choose which of the two sets of parties he would hold liable.

Now on that question there are a great many cases; they are collected in the notes to *Dumper*'s case (1), and they are uniform in this respect, *that where a man has an option to choose one or other of two inconsistent things, when once he has made his election it cannot be retracted, it is final and cannot be altered*. (Emphasis added.)

[28] In the old local case of *Ee Kim Kin v The Collector of Land Revenue, Alor Gajah* [1967] 2 MLJ 89, the applicant sought mandamus directing the collector to hold an inquiry for compensation or issue an award in respect of land acquisition. However, at an earlier inquiry, the applicant was present with others in respect of the same land acquisition although he did not participate in it. He also accepted his share of compensation. His application was dismissed on the ground of estoppel and the doctrine of election. Ismail Khan J said as follows:

I have found that the first ground was untrue. As to the second, I do not think that the applicant should be allowed to blow hot and cold. He who had accepted compensation pursuant to an award is estopped from saying it was not an award.

[29] His Lordship cited the following passage from the judgment of Scrutton LJ in *Verschures Creameries Ltd v Hull and Neatherlands Steamship Co Ltd* [1921] 2 KB 608 at p 611 which reads as follows:

A plaintiff is not permitted to 'approbate and reprobate'. The phrase is apparently borrowed from the Scotch law, where it is used to express the principle embodied in our doctrine of election — namely, that no party can accept and reject the same instrument ... The doctrine of election is not however confined to instruments. A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. That is to approbate and reprobate the transaction.

[30] In a more recent case in relation to the application of the doctrine to a cause of action, the Court of Appeal in *Annie Quah Lay Nah v Syed Jafer Properties Sdn Bhd & Ors* [2007] 1 MLJ 225; [2007] 1 CLJ 1 had to consider a case where neither party lodged an appeal against a particular decision of the High Court on the ground that the order should not have been made because the enforcement proceedings had been discontinued a day earlier. However, after nine years, the second respondent took out a summons to set aside the said order. In disapproving the action of the second respondent, the Court of Appeal speaking through Gopal Sri Ram JCA said as follows:

[7] Now, it is a general rule — applying strict principles of adjectival law — that once an action has been withdrawn by a notice of discontinuance, there is nothing left on which the court may adjudicate. However, where the parties to a cause or matter have proceeded upon a common assumption that a notice of discontinuance

> is not to be acted upon, then, the court will not permit either party to assert the propriety of the discontinuance. There is a slightly different way of stating the same proposition. It is this. If one of the parties to litigation is faced with two mutually exclusive alternatives and he elects to pursue one then he will be estopped from retreating from the position he has adopted by his election.

[31] In contract cases, a plaintiff is not permitted to pursue inconsistent remedies. In *Goh Hooi Yin v Lim Teong Ghee & Ors* [1990] 3 MLJ 23, the purchaser of a parcel of land questioned the title of the vendor but did not elect to rescind the agreement. Edgar Joseph Jr J said as follows:

> It is, of course, trite law that the right to rescind is lost if a purchaser fails to exercise it immediately and definitely (*Haynes v Hirst* (1927) 27 SR (NSW) 480) as soon as he discovers the want of title in the vendor otherwise he keeps the contract alive as against himself as well as the vendor (*Macdonald v Marson* (1913) 33 NZLR 248).
>
> So too, if the purchaser even seeks an explanation, instead of immediately repudiating the contract, he thereby elects to treat it as subsisting (*Haynes v Hirst* (1927) 27 SR (NSW) 480) and will be deemed to have waived the right (*Harold Elliot Ltd v Pierson* [1948] 1 Ch 452). The right to rescind is lost because a person who has open to him two alternative courses or remedies must elect between them and exercise such election in such a way that the other party may know which attitude he is adopting. Once he has exercised his option either way, he is bound by it (*Haynes v Hirst* (1927) 27 SR (NSW) 480).

[32] Similarly, in the recent unreported case of *Low Kian Hoew v Lu Zhijun & Ors* [2020] MLJU 2187, Liza Chan J opined that the pursuing inconsistent remedies such as rescission and specific performance at the same time is not allowed as it would result in a double claim.

APPLICATION OF THE DOCTRINE OF ELECTION BY HIGH COURT

[33] In the instant case, there is no issue of inconsistent causes of action or inconsistent remedies. The appellant succeeded in her action for trespass. The learned High Court judge who tried liability only awarded nominal damages. Upon appeal, a trial was ordered to assess damages. The issue of election arose only in respect of the bases of damages for trespass. The appellant, as we said earlier, took the compensatory approach in the statement of claim whereas at the end of the trial, her counsel argued for restitutionary damages or a gains-based approach as the respondent's witness gave evidence in respect of the profits his company made during the period of the trespass. The key question that we must answer is whether the change of course in the approach to damages by counsel for the appellant at the end of the trial had put the respondent in such a disadvantageous position that the claim for damages should be wholly dismissed.

[34] It is apparent from the judgment that the learned High Court judge relied on the unreported local High Court case of *Villa Putra Management Corporation v Mayland View Sdn Bhd* [2015] 9 MLJ 779; [2014] 1 LNS 1096 to completely deny damages to the appellant. The relevant passage quoted by the learned High Court judge from the *Villa Putra* case is as follows:

> [26] The cases quoted above illustrate that in trespass, a plaintiff can claim for either loss of use of his land or the profit the defendant has made by using his land. A claim for market rent for loss of use pursuant to the user principle is on the basis of the amount that the plaintiff would have obtained if he had let the property. A plaintiff seeking market rent does not have to show that he would actually have let the premises in the relevant period; if he would not have let the property he is, in fact seeking restitution of the defendant's unjust enrichment arising from the benefit the defendant had obtained by having use of the property. He would likewise be seeking restitution of the defendant's unjust enrichment if he sought to claim the profits which the defendant actually made. The measure of damages is therefore not what the plaintiff has lost, but the benefit or gain the defendant has obtained by having use of the property. See *Penarth Dock Engineering Co Ltd v Pounds* [1963] 1 Lloyd's Rep 359.

[35] However, in our respectful view, the above passage is only a restatement of the law with regard to the bases of damages for trespass. It is not an authority to deny an award of damages to a plaintiff who has pleaded and tendered evidence of loss under the compensatory approach in the final submissions. It is also instructive to note that in the *Villa Putra* case, the plaintiff actually succeeded in obtaining damages despite departing from its pleaded position. In the statement of claim, the plaintiff claimed that the trespass in question occurred in 2006. At the trial, the plaintiff claimed for trespass from 2010 onwards. The court did not permit the plaintiff to depart from the pleadings but nonetheless saw fit to award damages from the year 2010 onwards. The claim for damages was not dismissed outright.

[36] The learned High Court judge in the instant case also cited the English Court of Appeal case of *Ministry of Defence v Ashman* in support. This case was cited in the *Villa Putra* case. The respondent's counsel also relied on this case and argued that the inconsistent approach to compensation in the statement of claim and the final written submissions is fatal. In particular, the following paragraph from the judgment of Hoffmann LJ in *Ministry of Defence v Ashman* was drawn to our attention:

> A person entitled to possession of land can make a claim against a person who has been in occupation without his consent on two *alternative* bases. The first is for the loss which he has suffered in consequence of the defendant's trespass. *This is the normal measure of damages in the law of tort*. The second is the value of the benefit which the occupier has received. This is a claim for restitution. *The two bases of claim are mutually exclusive and the plaintiff must elect before judgment which of them he wishes to pursue*. (Emphasis added.)

[37] Again, it must be appreciated that Hoffman LJ was only stating the law that a plaintiff in a trespass action must choose one of two bases of damages. This is fair, as the defendant will have notice of the basis for compensation, and there will be no double claim as to damages. Lord Hoffman LJ or the other two judges in that case did not say that a change in election as to the two bases of computation would result in the claim for damages being dismissed completely. In *Ministry of Defence v Ashman*, the wrong approach to damages was taken by the plaintiff in the county court. However, the Court of Appeal did not dismiss the claim. The case was remitted to the county court for damages to be reassessed in accordance with the directions of the Court of Appeal.

[38] For sake of completeness, we also note that counsel for the respondent did not submit any authority where a claim for damages for trespass was dismissed solely on the ground that the pleaded basis for compensation which was supported by evidence was changed to another basis at the end of the trial.

[39] We note that in the cases we discussed earlier, the doctrine of election is meant to prevent surprise, unfairness and double claims that could prejudice the defendant due to inconsistent actions and remedies. We cannot see what prejudice the respondent in the instant case would have suffered if the claim for the lesser sum, based on the compensatory approach, was awarded. The appellant pleaded compensatory damages in the amended statement of claim. Evidence was led in respect of the same without objection on a point of pleading. It was only in the final submissions, that counsel for the appellant submitted that a higher award should be made based on the profits made by the respondent. The learned High Court judge correctly found that compensation based on the profits made by the respondent was not pleaded. Therefore, the learned High Court judge could have addressed this issue from the standpoint of the rules of pleading. Her Ladyship could have directed that any award would have to be in accordance with the pleaded case as happened in the *Villa Putra* case instead of dismissing it entirely.

[40] We also find merit in the submission of counsel for the appellant that the learned High Court judge was not quite right when she said that the claim for compensatory damages was abandoned. This is because counsel for the appellant had also said in his final oral reply that in the event the court is not with him in awarding damages based on the gains of the respondent, damages can be awarded based on the evidence of PW1, ie for loss of use of the land for oil palm cultivation.

[41] We also find that, having regard to the plea for compensatory damages in this case, the learned High Court judge erred in taking the view that a claim for damages should not include an element of profit. In para [36] of the

judgment, Her Ladyship said as follows:

> [36] But there is another reason why the claim for the defendant's profits should fail in the instant case. It is trite law that the relevant principle in the law of tort is to restore the injured party to the situation which would have prevailed had no injury been sustained — *restitutio in integrum*. Further, the principle that the award of damages is not to include any element of profit similarly applies in an action for tort (see *Johandra Realty Sdn Bhd & Anor v Ketua Pengarah Jabatan Pengairan dan Saliran Malaysia & one other* [2021] 2 MLJ 738). To allow the plaintiff's claim would be contrary to these well-established legal principles.

[42] In the *Johandra Realty* case cited above, the computation of damages for trespass included overlapping claims, ie mesne profits and loss of income at the same time. It is for this reason that the plaintiff's claim was found to be unreasonable by the court. In any event, as we said earlier, the appellant in this case should be entitled to the damages that she pleaded, ie compensatory damages for being kept out of her land for 17 years.

EXPERT EVIDENCE OF THE APPELLANT

[43] PW1, who is an expert witness from the oil palm industry with 45 years of experience, gave evidence regarding the appellant's loss. It is for the lesser sum of RM266,990.50 during the period of the trespass. The expert's conclusion as quoted in the High Court judgment is as follows:

> In conclusion, based on the performance of AJCESB, the estimated average profit which the plaintiff can make from 2001 to 2015 is RM2,857.50 per hectare x 6.229 hectares x 15 years which would amount to RM266,990.50.

Considering the evidence of the respondent's witness who candidly said that his company made a profit exceeding RM400,000 during the period of trespass, it cannot be said that the projected profit calculated by PW1 is a gross exaggeration. Moreover, the learned High Court judge, did not reject PW1's evidence on the ground that it is not creditworthy or plausible. The main challenge mounted by the respondent to PW1's evidence was in respect of development costs. It was submitted that development costs were not considered in calculating profit. However, it is a fact that when the appellant became the owner of the land on 11 June 1998, the land had already been developed as an oil palm plantation to some extent. The purpose of the purchase was to make a profit out of oil palm cultivation. In any event, the expert report of the appellant refers to the net profit of a comparable oil palm land. Despite the manner in which PW1 answered questions during cross-examination about development costs, his report indicates that all expenses had been taken into account in arriving at net profit.

CONCLUSION

[44] For the above reasons, we are of the view that the learned High Court judge erred in applying the doctrine of election to completely dismiss the claim of the appellant for damages. In the premises, we shall allow the appeal and set aside the decision of the High Court. Having regard to the evidence of PW1 which was not discredited, we shall allow general damages in the sum of RM266,990. We shall also order interest of 5%pa from the date of notice to quit until the date of realisation. We shall dismiss the claim for exemplary damages as the Court of Appeal order granting a trial for the assessment of damages made no mention of it. The Court of Appeal only ordered damages to be assessed. The respondent is to pay costs of RM30,000 here and below subject to allocatur.

Appeal allowed.

Reported by K Selvaraju